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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS,
TINA M. FOSTER, GITANJALI S. GUTIERREZ,
SEEMA AHMAD, MARIA LAHOOD,
RACHEL MEEROPOL,

Plaintiffs,

v.

GEORGE W. BUSH,
President of the United States;
NATIONAL SECURITY AGENCY,
LTG Keith B. Alexander, Director;
DEFENSE INTELLIGENCE AGENCY,
LTG Michael D. Maples, Director;
CENTRAL INTELLIGENCE AGENCY,
Michael V. Hayden, Director;
DEPARTMENT OF HOMELAND SECURITY,
Michael Chertoff, Secretary;
FEDERAL BUREAU OF INVESTIGATION,
Robert S. Mueller III, Director;
JOHN D. NEGROPONTE,
Director of National Intelligence,

Defendants.

Case No. 06-cv-313

Judge Gerard E. Lynch

Magistrate Judge Kevin N. Fox

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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August 29, 2006

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I. PLAINTIFFS HAVE ESTABLISHED STANDING

Defendants' primary argument against Plaintiffs' standing to sue is that *Laird v. Tatum*, 408 U.S. 1 (1972), mandates that any "challenged exercise of government power [be] regulatory, proscriptive, or compulsory in nature and that the complainant [be] presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging." *Id.* at 11 (quoted in Defs. Reply at 6). This argument fails because *Laird* does not institute a requirement that the actions creating a chilling effect be "regulatory, proscriptive, or compulsory." Defendants also claim that Plaintiffs' communications fall far afield of the scope of the NSA Program and that, in any event, Plaintiffs had no reason to experience an additional chilling effect from the existence of the Program. For the reasons set forth below, neither argument is availing.

A. *Laird v. Tatum* does not mandate that every chilling effect result from a "regulatory, proscriptive, or compulsory" exercise of government power

In summarizing a number of its previous "chilling effect" opinions, the Supreme Court in *Laird* also stated that in each of them, the "challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature." *Id.* While the government labors to establish this as the holding of *Laird*,[1] that part of the opinion merely surveyed and distinguished previous Supreme Court cases. It did not announce a new standard for future cases.[2] Subsequent cases

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1 *See* Defs. Motion to Dismiss (MTD) at 19, 22 n.9; Defs. Reply at 4-7.

2 Justice Marshall, sitting alone as Circuit Justice to review a denial of a stay, similarly stated that this was too broad a reading of *Laird*, rejecting precisely the argument Defendants make here. *See Socialist Workers Pty. v. Attorney General*, 419 U.S. 1314, 1318 (1974) (Marshall, Circuit J.):

> The Government has contended that under *Laird*, a 'chilling effect' will not give rise to a justiciable controversy unless the challenged exercise of governmental power is 'regulatory, proscriptive, or compulsory in nature,' and the complainant is either presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging. *Id*. In my view, the Government reads *Laird* too broadly. In the passage relied upon by the Government, the Court

have made it clear that *Laird* did not hold that only "regulatory, proscriptive, or compulsory" uses of government power may convey standing. *See, e.g.*, *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (rejecting argument that government intrusion must reach the level of "'coercive action'" before standing may be found in chill cases); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1096 (10th Cir. 2006) (en banc) (McConnell, J.) ("in some cases, First Amendment plaintiffs can assert standing based on a chilling effect on speech even where the plaintiff is not subject to criminal prosecution, civil liability, regulatory requirements, or other 'direct effect[s],'"); *id*. at 1095 ("To be sure, 'chilling effect' cases most often involve speech deterred by the threat of criminal or civil liability. Yet neither this Court nor the Supreme Court has held that plaintiffs always lack standing when the challenged statute allegedly chills speech in some other way."). The Supreme Court effectively rejected such a standard in *Meese v. Keene*, 481 U.S. 465, 473 (1987) ("governmental action need not have a direct effect on the exercise of First Amendment rights, we held [in *Laird*], [but] it must have caused or must threaten to cause a direct injury to the plaintiffs").[3]

> was merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not. … Because the 'chilling effect' alleged by respondents in *Laird* arose from their distaste for the Army's assumption of a role in civilian affairs or from their apprehension that the Army might at some future date 'misuse the information in some way that would cause direct harm to (them),' *ibid*., the Court held the 'chilling effect' allegations insufficient to establish a case or controversy. In this case, the allegations are much more specific: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some YSA delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed 'chill' is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question. The specificity of the injury claimed by the applicants is sufficient, under *Laird*, to satisfy the requirements of Art. III.

Id. at 1318-19.

[3] Notably, the surveillance cases Defendants cite against finding standing here both predate *Keene*, and in any event neither recites the "regulatory, proscriptive, or compulsory" standard Defendants suggest here. *See* Defs. Reply at 7 (citing *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) and *Halkin v. Helms* (*Halkin II*), 690 F.2d 977 (D.C. Cir. 1982)).

In any event, such a standard would be hopelessly unclear, especially in application to the facts of the present case. While "proscriptive" and "compulsory" are relatively definite terms, their meaning in regards to *prospective* injury—which *Laird* clearly permits to underlie standing—will always be open to interpretation and judicial judgment. For instance, is a threat of prosecution "proscriptive" if it is unlikely to come to fruition? Exactly this sort of ambiguity is presaged by the remainder of the sentence in *Laird* that Defendants insist contains its entire holding: the Court's statement that in the prior cases it surveyed, plaintiffs were "either presently or *prospectively* subject to" such government action. *Laird*, 408 U.S. at 11 (emphasis added) (quoted in Defs. Reply at 6). Moreover, the separate meaning of the term "regulatory" finds little guidance in the rest of the *Laird* opinion. Nothing in the examples given in *Laird*, 408 U.S. at 11-12, clarifies the term as a limitation on standing. Whatever its meaning, the Second Circuit has never adopted such a standard. Indeed, the Supreme Court itself has never repeated the "regulatory, proscriptive, or compulsory" formulation since *Laird*, and did not mention it in *Keene*.

In *Meese v. Keene* the government action on which standing was based—and which thus presumably met Defendant's alleged "regulatory, proscriptive, or compulsory" threshold—was the threat that Keene would be forced to label films he wished to show as "political propaganda." An analogous threat in our case would be if the government required us to give a disclaimer, at the outset of every sensitive phone call, that our communications were subject to monitoring by the government without judicial oversight or judicially-supervised minimization. But in fact that is *exactly* what Plaintiffs here are compelled—by their professional ethical obligations, as surely as if a statute required it, *see* Gillers Affirmation at ¶¶ 9-11—to do as a direct result of the Program.[4]

B. The Scope of the NSA Program Is Broad Enough to Encompass Plaintiffs' Communications

Defendants again attempt to claim that "plaintiffs' claim of a chill is patently unreasonable because it applies to communications with a category of people significantly broader than those potentially subject" to the Program. (Defs. Reply at 4.) In listing examples of these "communications well outside the scope of the TSP," *id*., Defendants claim that Plaintiff Maria LaHood has claimed to be chilled "in conversations with 'Canadian Attorneys' representing a terrorism suspect." (*Id*. at 5.) Defendants neglect to add that the Affirmation states that these are "Canadian attorneys representing Maher Arar"—a man the United States government continues to insist is a member of Al Qaeda. (LaHood Aff. at ¶ 7.) Defendants imply that the Supplemental Affirmation of William Goodman claims fear of surveillance of communications with generic "family members of detainees, 'foreign witnesses, experts, and human rights advocates'" (Defs. Reply at 5), ignoring the statement that these communications are with people we "need to communicate with in the course of the litigation" of cases relating to Guantánamo detainees. (Goodman Supp. Aff. at ¶ 4.) The admitted scope of the NSA Program clearly subsumes these sorts of communications. *See* Pls. Memorandum in Support of Partial Summary Judgment at 8 (describing Program's scope).

[4] The relief Plaintiffs seek is also not barred by *Laird*'s refusal to grant "a broad-scale investigation … to probe into … intelligence-gathering activities." (MTD at 19 (quoting *Laird* at 14).) Plaintiffs are not demanding a "broad-scale" probe; instead, they are demanding the injunctive relief and the limited disclosure they need in order to continue to function as civil rights lawyers and carry out their continuing duties to their clients.

C. Plaintiffs Are Justifiably More Chilled by Warrantless Surveillance outside of Judicial Supervision Than by Surveillance under FISA or Other Means

Defendants claim that due to the "ordinary risk that international communications with al Qaeda members, agents, and affiliates are subject to monitoring by other methods or entities, the TSP cannot cause Plaintiffs or others any reasonable chill when engaging in such communications." (Defs. Reply at 8.) Of course, this argument ignores the primary defect with the NSA Program: the total absence of judicial oversight. A communication with an individual the executive merely suspects of a link to terrorism, without evidence sufficient to reach the requisite threshold for cause, will not be subject to surveillance under FISA, but will be subject to surveillance under the NSA Program.

Moreover, as Plaintiffs noted in their Opposition to the Motion to Dismiss, "under the [pre-NSA Program] regime attorneys could trust (and assure their clients) that their privileged communications would remain confidential because any information intercepted under the standard lawful procedures was subject to 'minimization procedures required' to protect privileged information." (Pls. Opp. to MTD at 11.) Defendants have no real response to this argument. They claim that there is no evidence that the NSA Program "has any fewer minimization protections[] than does the interception of such communications under FISA or by a foreign government or other entity." (Defs. Reply at 9.) But, as Plaintiffs' Response to the Motion to Dismiss made clear, the constitutional requirement of minimization includes the "vital aspect" of ongoing judicial oversight. (Pls. Opp. to MTD at 12.) That aspect is absent from the NSA Program. (Pls. Mem. in Support of Summary Judgment at 7-8 and 7 n.22.) Indeed, as Plaintiffs noted in their earlier brief, the administration has admitted that attorney communications are "not ... categorically excluded from interception" under the NSA Program. (Pls. Opp. to MTD at 12.)

The risk of foreign government surveillance of the same international communications is speculative, and such interceptions are self-evidently less likely to be communicated back to United States authorities (who might then use the information against vulnerable detainees, or against their interests in court cases or other proceedings) as intelligence agencies typically do not easily share information with other agencies, much less other governments. In any event, the risk of foreign government surveillance is no more relevant to the chilling effect in this case than the risk of private party surveillance (for instance, a phone company employee eavesdropping on calls and conveying that information anonymously to the government). In neither foreign government surveillance nor private party eavesdropping is the information overheard generally as likely to be used to the detriment of the client's physical safety (if detained by the United States) or his case.

In response to Plaintiffs' averments that third parties have refused to communicate with them in light of the NSA Program's disclosure, Defendants claim that the "subjective" reaction of third parties not before the Court "is an even more attenuated and insufficient claim of injury" than that based in Plaintiffs' own reaction to the Program. (Defs. Rep. at 7-8.) It is worth noting that in *Keene*, the prospective harm was the damage to Keene's chances of reelection created by the predicted reactions of voters to his showing of foreign films labeled "political propaganda." Presumably Defendants would find those third-party reactions equally insufficient to support a claim of standing, yet the Supreme Court came to the opposite conclusion in *Keene*.

* * *

Contrary to Defendants' position, there is nothing formulaic about standing analysis. Neither cases involving secret surveillance programs nor cases not involving "regulatory, proscriptive, or compulsory" action are categorically excluded from the federal courts. The central analytical concepts are those laid out by the Supreme Court as the "irreducible constitutional minimum"[5] of Article III's case-or-controversy requirement: that a plaintiff "has sustained or is immediately in danger of sustaining some direct injury"[6] to a legally protected interest; that the injury must be "concrete and particularized"[7] and not "hypothetical" or "conjectural";[8] and that it must be "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[9] None of these requirements—particularly the causality requirement, and the closely-intertwined redressability requirement—can be addressed algebraically; there will always be an element of judgment involved in a finding of causation in a case involving allegations of chilling effect. In *Laird*, the Supreme Court—applying its judgment, not a formula—denied standing where the plaintiffs were subject to lawful surveillance,[10] where the chill they experienced was of low intensity,[11] if it existed at all,[12] and

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5 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

6 *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

7 *Allen v. Wright*, 468 U.S. 737, 756 (1984).

8 *Lyons*, 461 U.S. at 102.

9 *Allen*, 468 U.S. at 751.

10 It is worth noting that the *Laird* Court itself stated that claims of more substantial military interference with civilian life, especially "unlawful activities," might support standing:

> the claims alleged in the complaint ... reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Laird, 408 U.S. at 15-16. The NSA is, of course, an agency of the Defense Department.

was evidenced by no subsequent objective harm (and thus received the label "subjective"). None of these factors are present here. Plaintiffs have more than met their burden of showing all the necessary elements of standing.

II. DEFENDANTS HAVE FAILED TO ESTABLISH THAT PLAINTIFFS' SUMMARY JUDGMENT MOTION SHOULD BE DENIED

Notwithstanding the fact that the Court denied the defendants' motion for a stay with respect to plaintiffs' Motion for Summary Judgment until after Defendants' state secrets motion was decided, the defendants failed to address the merits of the summary judgment motion in their Reply Brief. (Defs. Reply 50-54.) Defendants argued that the only appropriate response to the summary judgment motion was the assertion of the state secrets privilege. The government evidently takes the position that there is nothing it can say to provide constitutional justification for the NSA Program, other than what is implicit in its argument about state secrets.

The government's argument that the courts cannot resolve the general question of whether the president has authority to engage in warrantless electronic surveillance of communications between Americans and persons overseas without access to state secrets is unprecedented. None of the four circuit courts of appeals that have ruled on this issue previously have had access to such information. It is fatally inconsistent to its argument for the government to argue both that there is persuasive precedent that such surveillance is constitutional and that courts cannot decide the question without access to state secrets that were not available in the previous cases.

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[11] *See Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978) ("The district judge read *Laird* too broadly. That case did not hold that chilling effect is not legally cognizable; rather, it held that the chilling effect alleged *in that case* was so remote and speculative that there was no justiciable case or controversy").

[12] *See* Pls. Opp. to MTD, at 7 n.4.

In *United States v. Clay,* 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698, *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1970) (en banc), *United States v. Truong Dinh Hung,* 629 F.2d 908 (4th Cir. 1980) and *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1976) (en banc), the courts had no state secrets information. Nor did the government argue in the most recent of those cases that the question of the president's constitutional authority could not be resolved without state secrets information. *See* Brief for the United States, *United States v. Humphrey and United States v. Truong*, Nos. 76-5176, 78-5177 (4th Cir. May 14, 1979), 1979 WL 212414. Finally, the court perhaps most likely to recognize any need for state secrets to analyze the constitutional issue made no reference to them when it simply took for granted that the power existed. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002). Yet all of these courts ruled on the question of whether the president has constitutional authority to conduct warrantless electronic surveillance for foreign intelligence purposes. Similarly, the Supreme Court relied upon no state secrets or classified information when it resolved the issue of whether the president had constitutional authority to conduct warrantless electronic surveillance with respect to domestic threats to national security. *United States v. United States District Court*, 407 U.S. 297 (1972) ("Keith").[13]

The error in the government's reasoning is its assumption that the issue in the case is "not whether the President has authority to undertake foreign intelligence surveillance, given his core Article II responsibilities, but when that authority may be applied." (Defs. Reply at 37). From this they draw the conclusion that a detailed exposition of NSA activities and information is

[13] The government argues that it is "quite beside the point" that the Supreme Court did not delve into the details of how the surveillance was conducted in *Keith.* It gives no explanation of this statement. We rely on *Keith* as an appropriate analogy on the question of whether sensitive information is necessary to resolve the basic question of the president's constitutional authority.

required. In fact, however, the question in this case is the most basic one: whether the president has constitutional authority to undertake warrantless foreign intelligence surveillance.

The authority on which the government relies to establish the president's constitutional authority is unconvincing. *Clay, Brown* and *Butenko* were decided before FISA was enacted, which severely undercuts their precedential authority. Moreover, the analysis in these cases is exceedingly brief, shallow and unpersuasive.[14] *Truong*, although decided after FISA, involved surveillance that ended well before FISA was passed,[15] and conducts such an abbreviated analysis that it mentions the new statute only in a footnote and contains no analysis of FISA's impact on the president's implied authority pursuant to Justice Jackson's concurrence in *Youngstown*. A far more thorough, historical and scholarly analysis was conducted by Judge Skelly Wright in *Zweibon*, in the plurality opinion that concluded that the president lacks constitutional power to conduct warrantless electronic surveillance. That argument has been considerably strengthened by the passage of FISA, which demonstrated that Congress not only does not recognize any such general power on the part of the president, but has made its attempted exercise a criminal offense.

The government's brief also cites the usual cases to establish the proposition that the president has preeminent authority with respect to the conduct of foreign affairs. Cases such as *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936) and *Chicago & Southern Air Lines v. Waterman*, 333 U.S. 103 (1948) do not resolve the question of whether the president has

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14 See the detailed analysis of the weaknesses of these opinions in *Zweibon*, 516 F.2d at 639-41.

15 The surveillance at issue in *Truong* terminated in January 1978; FISA was enacted in October of that year. *See Truong*, 629 F.2d at 912 ("Truong's phone was tapped and his apartment was bugged from May, 1977 to January, 1978. ... Truong and Humphrey were arrested on January 31, 1978"). Thus the court's holding can only relate to the pre-FISA regime.

the power claimed in this case, however.[16] Both of those cases involved presidential power exercised pursuant to Congressional authorization. Moreover, the president's powers as Commander-in-Chief do not imply unilateral control over domestic policies, even those related to the conduct of foreign wars. As Justice Jackson warned in *Youngstown Sheet & Tube Co. v. Sawyer*, 385 U.S. 579, 636, n.2 (1952) (concurring op.), "no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture." Indeed, Jackson explained that an argument that the Commander-in-Chief can act in the domestic sphere without restraint by the other branches stands the constitutional design on its head: "The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Id*. at 646.

The question of the president's constitutional authority must be resolved by resort to first principles, not by analysis of the facts of a specific threat at a specific point in time. As Justice Jackson noted in *Youngstown*, "[t]he opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote … The tendency is strong to emphasize transient results upon policies … and lose sight of enduring consequences upon the balanced power structure of our Republic." *Id*. at 634.

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[16] In *Zweibon v. Mitchell*, Judge Skelly Wright noted that the recognition of the president's implied powers in the area of foreign affairs is "inapposite to the question of how those powers are to be reconciled with the mandate of the Fourth Amendment." 516 F.2d at 621.

Jackson wisely recognized that the framers were not unaware of emergencies, and yet provided no general relief from constitutional constraints in emergencies:

> The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work …

Id. at 649-50.

Defendants accuse Plaintiffs of relying more on rhetoric than reasoning and suggests that its arguments flow from mere obedience to the law. The argument that the assertion of the state secrets privilege renders this case nonjusticiable is, they claim, merely "a straightforward application of a long recognized constitutionally-based privilege." (Defs. Reply at 11.) The case, however, involves more than that and the government does not recognize, or does not want to admit, two significant consequences that flow from its argument. The first is that if a state secrets claim could disable a court from making a principled decision about whether the Constitution gives the president a general power that on its face violates an explicit provision of the Bill of Rights and the will of Congress, executive power would be unchecked in contravention of basic constitutional principles of limited government and separation of powers.

The second devastating implication of the government's position is reflected in its argument in response to Plaintiffs' arguments and declaration that prior to the TSP they understood that all authorized means of government electronic surveillance involved judicial review. The government's response was, "But that is something Plaintiffs could not possibly know." Clearly the law, both in Title III and FISA, provided that electronic surveillance required judicial review. The government is apparently saying that plaintiffs could not know whether it had authorized surveillance without judicial review before the TSP. This is an acknowledgement that the government does not recognize one of the essential functions of the Fourth Amendment – assuring citizens that they may conduct their affairs in private, except insofar as the law permits government intrusions. If such intrusions may be authorized secretly by the executive with no approval required by the judiciary or the Congress, no citizen could ever know whether he or she could communicate privately without government surveillance. This is far less than the Fourth Amendment guarantees.[17]

III. DEFENDANTS' DISCUSSION OF THE ALLEGED STATUTORY PRIVILEGES CONFUSES THE ISSUES

Defendants note that the original civil service obligations to which Section 6 of the National Security Agency Act relates have been repealed, and imply that this somehow provides support for their extraordinarily broad reading of Section 6. (Defs. Reply at 47 and 47 n.19.) Presumably Defendants are claiming that since Congress did not modify the language of Section 6 when it repealed the civil service reporting provision, Congress must have intended that Section 6 be read outside of the context of the original civil service reporting provisions it was intended to exempt the NSA from. This ignores the fact that Section 6 was never codified into an actual provision of the U.S. Code; it remains a "note" to the original 1959 NSA Act, Pub. L. 86-36. It is not at all clear that Congress would want a note to the original 1959 statute in the Statutes at Large to have a meaning that shifted with the changing provisions of the United States Code. The same error also explains why the *current* content of 10 U.S.C. § 1582 is irrelevant to the analysis of Section 6. (*Cf.* Defs. Reply at 48 (noting that current 10 U.S.C. § 1582 is a disability accommodation provision unrelated to Section 6).) Again, it makes far more sense to read Section 6 against the version of 10 U.S.C. § 1582 that existed at the time of its passage—which was, as Defendants note, a personnel reporting position. (Defs. Reply at 48-49.)

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[17] Plaintiffs have not endeavored to comment herein on every claim about the caselaw made in Defendants' reply. However, one miscitation to caselaw by Defendants deserves special attention because the mistake it involves is not intuitive. Defendants claim that *Hamdan* resolved only a question of whether executive claims to power "were consistent with statutory law in an area where Congress has *clear textual powers* to regulate" (Defs. Reply at 40 n.15 (emphasis added)), and state that the Supreme Court held that the so-called Captures Clause (U.S Const., Art. I, sec. 8, cl.11, granting Congress the power to "make rules concerning captures on land and water") is such a clear grant of power. However, the Captures Clause conveys no such power. Instead, this provision allowed Congress to recognize or declare the law that applied to prizes seized by American forces—particularly ships and their cargoes captured by American privateers. *See, e.g.*, *An Act concerning Letters of Marque, Prizes, and Prize Goods*, ch. 107, 4, 2 Stat. 759, 759-60 (June 26, 1812). (The Clause was modeled on the Articles of Confederation art. 9 (1777) (conveying power of "establishing rules for deciding in all cases what captures on land or water shall be legal")). *See generally* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 Colum. J. Transnat'l L. 379, 406 (1997).

Defendants' brief also may create the misimpression that the *Hamdan* Court—incorrect though it might be—nonetheless relied on the Captures Clause as the sole source of Congressional power to regulate trials of military detainees. It did not; instead, it cited the Clause as one of a panoply of war-related Congressional powers, including also the powers "to 'raise and support Armies,' *id.*, cl. 12, to 'define and punish ... Offences against the Law of Nations,' *id.*, cl. 10, and 'To make Rules for the Government and Regulation of the land and naval Forces,' *id.*, cl. 14." Taken individually, none of these addresses by name the power to detain and try enemy soldiers, including the Captures Clause.

While the historical uses and context of these several clauses, taken together, support such a power, the Captures Clause itself does not "clearly" and "textually" convey it. (Regarding the historical uses, *see, e.g.*, *An Act for the safe keeping and accommodation of prisoners of war*, 2 Stat. 777, 12th Cong., 1st Sess. (1812); *see also* 2 Stat. 759, *supra* (regulating custody and safekeeping of prisoners captured on prize vessels by ships operating under executive commission, and safekeeping and support in subsequent custody of United States marshals).

The House Report confirms this and explicitly states that Section 6 was intended to be read against the then-existing version of 10 U.S.C. § 1582:

> Section 6 of the bill, which is in the nature of a savings clause, provides that nothing *in the bill* will require the disclosure of the organization or any function of the National Security Agency, except *as presently provided* in the reporting requirements contained in 10 U.S.C. 1582.

H.R. Rep. No. 86-231, at 4 (emphasis added) (attached, together with Pub. L. 86-36, as Appendix A to this brief). This part of the Report also indicates that Congress did not intend Section 6 to exempt the NSA from all reporting of any sort for all time. Despite the fact that the text of Section 6(a) reads "nothing in this Act or any other law," the House Report's more limited wording—"nothing *in the bill* will require ... disclosure ... except as presently provided"—indicates that Section 6 is best read to refer to "any other [existing] law" at the time of its passage.[18] Congress' generally limited intent with Section 6 is also clear from the additional legislative history cited in Plaintiffs' Opposition to the MTD at 50.[19]

Respectfully submitted,

s/Shayana Kadidal

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August 29, 2006

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18 Indeed, in light of the legislative history, it is quite dubious whether Section 6 should be read to trump *subsequent* general disclosure statutes, such as FOIA, as may have been inadvertently suggested in Plaintiffs' Opposition Brief. *Cf.* Pls. Opp. to MTD at 51.

19 As to Defendants' claim that "Plaintiffs' argument also makes no sense," Defs. Reply at 48 n.21, it suffers from the same defect as the *Linder* opinion. We did not "argue that subsection (b) makes NSA employees subject to Civil Service Commission reporting," *id.*; rather, we argued that "Subsection (b) makes *certain* NSA employees subject to the Civil Service Commission reporting act," Pls. Opp. at 51 n.47 (emphasis added). Restoring the key word ignored by Defendants ("certain") should clarify matters.

Certificate of Service

I, Shayana Kadidal, certify that on August 29, 2006, I caused the foregoing Memorandum (together with its Appendix A) to be filed electronically on the ECF system and served via email on the counsel for defendants listed below.

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Dated: August 29, 2006

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APPENDIX A

H.R. Rep. No. 86-231
Pub. L. 86-36

86TH CONGRESS 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 231

ADMINISTRATIVE AUTHORITIES FOR NATIONAL SECURITY AGENCY

MARCH 19, 1959.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DAVIS of Georgia, from the Committee on Post Office and Civil Service, submitted the following

REPORT

[To accompany H.R. 4599]

The Committee on Post Office and Civil Service, to whom was referred the bill (H.R. 4599) to provide certain administrative authorities for the National Security Agency, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

AMENDMENTS

The committee proposes amendments to the text, and an amendment to the title, of the bill, as reported.

AMENDMENTS TO THE TEXT

The proposed amendments to the text are as follows:

(1) Page 1, lines 8 to 11, inclusive, strike out "The Director of the National Security Agency is authorized to establish such positions and to appoint such officers and employees as may be necessary to carry out the functions of such Agency." and insert in lieu thereof "The Secretary of Defense (or his designee for the purpose) is authorized to establish such positions, and to appoint thereto such officers and employees, in the National Security Agency, as may be necessary to carry out the functions of such agency.".

(2) Page 2, line 1, strike out "by the Director" and insert in lieu thereof "by the Secretary of Defense (or his designee for the purpose)".

(3) Page 2, lines 11 and 12, strike out "grades GS–16, GS-17, and GS–18" and insert in lieu thereof "grades 16, 17, and 18".

(4) Page 2, lines 19 and 20, strike out "The Director of the National Security Agency may establish" and insert in lieu thereof "The Sec-

retary of Defense (or his designee for the purpose) is authorized to establish in the National Security Agency".

(5) Page 2, lines 20 and 21, strike out "in such agency".

(6) Page 4, line 5, strike out "Act" and insert in lieu thereof "section".

The proposed amendments Nos. (1), (2), (4), and (5) all have the same purpose: To make it clear that the authority for the establishment in the National Security Agency of the positions covered by the bill, the making of appointments to such positions, and the fixing of the rates of compensation for such positions is vested in the Secretary of Defense, who may delegate, in his discretion, this authority to an officer or employee under his jurisdiction. Because the bill, as introduced, provided for the exercise of this authority by the Director of the National Security Agency, an officer under the Department of Defense and subordinate to the Secretary of Defense, the question existed as to whether the general authority of the Secretary of Defense was paramount to the special authority vested by the introduced bill in the Director of the National Security Agency. These proposed amendments remove any ambiguity which may have been created by the introduced bill with respect to the authority of the Secretary of Defense over the Department of Defense by vesting in the Secretary of Defense the authority contained in the bill relating to positions in the National Security Agency.

The proposed amendment No. (3) conforms the references in section 2 of the introduced bill to grades 16, 17, and 18 of the General Schedule of the Classification Act of 1949, as amended, to the references to such grades in section 7 of the bill.

The proposed amendment No. (6) corrects the reference, in section 7 of the introduced bill, to the effective date (incorrectly stated as "the effective date of this Act") by restating the effective date for the purposes of section 7 as "the effective date of this section".

Amendment to the Title

The proposed amendment to the title is as follows:

Amend the title so as to read:

A bill to provide certain administrative authorities for the National Security Agency, and for other purposes.

The purpose of the proposed amendment to the title is to set forth correctly in the title the name of the National Security Agency which was stated incorrectly as "National Agency" in the title of the bill, as introduced.

Statement

Purpose of Legislation

The purpose of this legislation is to eliminate an operational conflict that has developed between the performance of the National Security Agency of its lawful functions and the performance by the U.S. Civil Service Commission of its responsibilities under the Classification Act of 1949, as amended. The legislation will accomplish this purpose by exempting the National Security Agency from such act.

Explanation of Need for Legislation

The National Security Agency was established in and under the Department of Defense to perform certain highly classified national security functions prescribed by the National Security Council. The nature of these functions and their relationship to the national security are such as to preclude the National Security Agency from disclosing—to the U.S. Civil Service Commission or any other Government agency, as well as to the public or any individual—personnel data and information which normally is required by the Civil Service Commission to perform its audit, review, and other duties under the Classification Act of 1949. The National Security Agency thus is in the position, by reason of security limitations in its organic authority, of being prohibited from providing information needed by the Civil Service Commission in connection with the duties of the Commission under the Classification Act of 1949. The Commission, in turn, is in the position of being required to perform its normal functions with respect to National Security Agency personnel matters without being able to obtain much of the information it must have to do its job.

For example, the Civil Service Commission is required, among other responsibilities imposed on it by the Classification Act of 1949, to prescribe standards for various categories of positions subject to the act, and to audit the classifications and salary grades of such positions in the departments and agencies. To do this, of course, the Commission must have full information on the need for such positions and the duties involved. The National Security Agency, on the other hand, may not legally permit access by the Commission to such information. This makes any standards prescribed, or audit action taken, by the Commission a mere formality which serves no useful purpose. In fact, the situation is such as well may tend to obstruct maximum efficiency and economy in the operations of both the National Security Agency and the Civil Service Commission.

Hearings

The Director of the National Security Agency, accompanied by the Director of Manpower and Personnel, Deputy Director of Manpower and Personnel, and legal adviser of the Agency staff, testified at subcommittee hearings in executive session with respect to the need for this legislation and with respect to the existing position classification and compensation policies of the National Security Agency. The Chairman and the Executive Director of the U.S. Civil Service Commission also testified in support of the legislation.

In the light of the overriding security considerations involved in this legislation, it is not deemed appropriate to set forth in detail the matters presented by witnesses at the hearing. Members present at the hearing questioned the National Security Agency witnesses at length and in detail regarding existing employment, classification, and compensation policies as well as related policies which would be in effect upon enactment of H.R. 4599. The questions were answered fully and, in the judgment of the members, the information developed at the hearing completely justifies the request for this legislation. Moreover, the past record of personnel administration by the National

Security Agency with respect to the creation of positions in the Agency and the salaries paid warrants reliance on the assurance, given by the Director of the National Security Agency, that the Agency's conservative existing policy will be continued under this legislation and that particular care will be exercised to prevent any undue increase in the number of high-salaried positions.

LEGISLATIVE EFFECT OF H.R. 4599

In summary, H.R. 4599 will exempt the National Security Agency from the Classification Act of 1949, and, in lieu of the provisions of that act, will place comparable authority and responsibility in the Secretary of Defense to provide such civilian positions, and the rates of basic compensation therefor, as are necessary to carry out the mission of the National Security Agency. Except as noted below with respect to certain scientific and professional positions, salary rates for such positions will be fixed in relation to the salary rates for positions under the Classification Act of 1949 which have comparable levels of difficulty and responsibility.

The salary rates of not more than 50 such positions in the National Security Agency may be fixed at levels equal to the salaries for grades GS-16, GS-17, and GS-18 (the so-called supergrade positions) under the Classification Act of 1949. Presently the Civil Service Commission has allocated 39 such supergrade positions to the National Security Agency. These 39 positions will be relinquished and the total number of supergrade positions available to the Civil Service Commission for allocation to departments and agencies will be reduced by an equal number.

H.R. 4599 also authorizes the Secretary of Defense to establish not more than 50 scientific and professional positions in the National Security Agency, at rates of compensation not in excess of the maximum rate ($19,000) prescribed for similar positions in certain departments and agencies by section 1581(b) of title 10, United States Code (originally enacted as Public Law 313, 80th Cong.). These 50 positions represent replacements for 50 similar positions now authorized for the National Security Agency under the statute referred to above. The 50 similar positions are withdrawn from the National Security Agency by the amendment made by section 3 of H.R. 4599. The positions so withdrawn will not be available to any other department or agency and will cease to exist.

Section 5 of the bill authorizes additional compensation for National Security Agency officers and employees who are citizens or nationals of the United States assigned to overseas duty, not in excess of additional compensation for overseas duty authorized for Federal employees generally by section 207 of the Independent Offices Appropriation Act, 1949 (5 U.S.C. 118h).

Section 6 of the bill, which is in the nature of a savings clause, provides that nothing in the bill will require the disclosure of the organization or any function of the National Security Agency, except as presently provided in the reporting requirements contained in 10 U.S.C. 1582.

Section 8 provides that the foregoing provision of the bill shall take effect at the beginning of the 1st pay period which commences not later than the 30th day following the date of enactment.

COST

The enactment of this legislation will result in no additional cost to the Government.

ADMINISTRATIVE RECOMMENDATIONS

This legislation is based upon an executive communication submitted by the Acting Secretary of Defense on January 2, 1959. This committee is advised by the Director of the National Security Agency that the Secretary of Defense recommends enactment of H.R. 4599, with the committee amendments, in lieu of the executive proposal. The Bureau of the Budget and the U.S. Civil Service Commission also have submitted letters with respect to this legislation. The executive proposal of the Acting Secretary of Defense and the letters from the Bureau of the Budget and the U.S. Civil Service Commission follow.

THE SECRETARY OF DEFENSE,
Washington, January 2, 1959.

Hon. SAM RAYBURN,
Speaker of the House of Representatives.

DEAR MR. SPEAKER: There is forwarded herewith a draft of legislation, to provide certain administrative authorities for the National Security Agency, and for other purposes.

This proposal is part of the Department of Defense legislative program for 1959. The Bureau of the Budget has advised that there would be no objection to the submission of this proposal for the consideration of the Congress. It is strongly recommended that this proposal be enacted by the Congress.

PURPOSE OF THE LEGISLATION

The National Security Agency was established over 5 years ago by a Presidential directive to provide centralized coordination and direction for certain very highly classified functions vital to the national security. The Agency was organized as an element of the Department of Defense and its operations are subject to the direction and control of the Secretary of Defense under a special committee of the National Security Council.

The proposed legislation would indirectly implement recommendations of the task force on intelligence activities of the Commission on Organization of the Executive Branch of the Government, and is designed to overcome difficulties which the Commission found had seriously handicapped the Agency in the accomplishment of its mission. As stated in the preface to the Commission's report to Congress on intelligence activities, dated June 29, 1955, the task force prepared a supplemental, highly classified report which was not considered by the Commission, but was sent directly to the President because of its extremely sensitive content. The recommendations with respect to the National Security Agency were contained in this classified report.

The civilian personnel administration of the Agency is presently subject to general supervision and control by the Civil Service Commission. However, detailed review of Agency actions by the Commission has not been practicable because of security considerations.

This creates an undesirable situation in which the Commission has a limited responsibility for supervising National Security Agency personnel actions but an even more limited opportunity for discharging that responsibility. The Commission concurs in the view that the Agency should be exempted from the Classification Act, subject to the limitations stated in the bill. Such exemption would be consistent with the treatment presently accorded other agencies engaged in specialized or highly classified defense activities.

The unique and highly sensitive activities of the Agency require extreme security measures. The bill, therefore, includes provisions exempting the Agency from statutory requirements involving disclosures of organizational and functional matters which should be protected in the interest of national defense.

COST AND BUDGET DATA

The enactment of the proposed bill would not result in increased costs to the Government.

Sincerely yours,

DONALD A. QUARLES, *Acting.*

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., March 12, 1959.

Hon. TOM MURRAY,
Chairman, Committee on Post Office and Civil Service,
House of Representatives, Washington, D.C.

MY DEAR MR. CHAIRMAN: This will refer to H.R. 4599 and H.R. 4600, identical bills respecting the National Security Agency, which will be the subject of committee hearings on Friday, March 13, 1959.

The subject bills are substantially the same as the proposal forwarded to the Congress by the Department of Defense on January 2, 1959. However, we would like to call to your attention certain differences which appear to have an effect not intended.

The first sentence of section 2 of the bills (lines 8–11 on p. 1) would authorize the Director of the National Security Agency to appoint such officers and employees as may be necessary. This authority is now vested in the Secretary of Defense. To vest a statutory appointing authority in the Director, a subordinate official, could well be interpreted as a limitation upon the Secretary's authority with respect to personnel of the National Security Agency. Such limitation would be highly improper, and should not be included.

The second sentence of section 2 (line 11 on p. 1, lines 1–5 on p. 2) directs that compensation of employees be fixed "in relation to" Classification Act rates for general schedule positions of corresponding levels of duties and responsibilities. While this language appears to be similar in intent to that proposed by the Department of Defense, we prefer the Department's language, since it clearly limits the NSA salary rates to the rates authorized under the Classification Act.

With modification in the light of the above comments, the Bureau of the Budget would have no objection to enactment of the bills.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., March 12, 1959.

Hon. TOM MURRAY,
Chairman, Committee on Post Office and Civil Service,
U.S. House of Representatives, Washington, D.C.

DEAR MR. MURRAY: This is in further reply to your letters of February 21, 1959, requesting the Commission's comments on H.R. 4599 and H.R. 4600, identical bills to provide certain administrative authorities for the National [Security] Agency, and for other purposes.

The bills would exclude the National Security Agency from the Classification Act of 1949, as amended, and would authorize the Director of the Agency to establish positions and fix rates of compensation in relation to rates of the Classification Act for positions subject to that act which have corresponding levels of duties and responsibilities. Not more than 50 employees may be paid at the rates of GS–16, 17, and 18.

Except for 50 civilian employees engaged in research and development functions, which require the services of specially qualified scientific or professional personnel, and who may be paid not to exceed the maximum rate ($19,000 per annum) provided for Public Law 313 type positions, no employee may be paid basic compensation in excess of the highest rate of the general schedule of the Classification Act. The authorization for 50 research and development positions is in lieu of provisions in existing law for 50 such positions. However, that law also requires prior Commission approval of qualifications and pay of appointees.

The National Security Agency performs highly specialized technical and coordinating functions pertaining to the national security. Because of the extreme security measures deemed necessary by the Agency it is not possible for the Commission to carry out its statutory mandate to determine whether positions in the National Security Agency have been placed in classes and grades in conformance with or consistently with standards published under the Classification Act.

Difficulties of the same type are encountered in connection with prior approval of positions in GS–16, 17, and 18 and in connection with the approval of qualifications and pay of employees engaged in research and development functions.

Since present statutes impose requirements on the Agency and the Commission which in the interests of national security cannot be properly exercised, the Commission favors the exclusion from the Classification Act and the revision in the methods for handling the research and development positions. However, we do believe that the standards prescribed under and the salary schedules of the Classification Act can and should be applied by the Agency to the optimum extent practicable.

The Commission has no objection to other provisions of the bills. For these reasons enactment of H.R. 4599 or H.R. 4600 is recommended.

We are advised that the Bureau of the Budget has no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,

ROGER W. JONES, *Chairman.*

Changes in Existing Law

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Section 202 of the Classification Act of 1949, as Amended (5 U.S.C. 1082)

TITLE II—COVERAGE AND EXEMPTIONS

*   *   *   *   *   *   *

Sec. 202. This Act (except title XII) shall not apply to—

(1) the field service of the Post Office Department, for which the salary rates are fixed by Public Law 134, Seventy-ninth Congress, approved July 6, 1945, as amended and supplemented;

(2) the Foreign Service of the United States under the Department of State, for which the salary rates are fixed by the Foreign Service Act of 1946, as supplemented by Public Law 160, Eighty-first Congress, approved July 6, 1949; and positions in or under the Department of State which are (A) connected with the representation of the United States to international organizations; or (B) specifically exempted by law from the Classification Act of 1923, as amended, or any other classification or compensation law;

(3) physicians, dentists, nurses, and other employees in the Department of Medicine and Surgery in the Veterans' Administration, whose compensation is fixed under chapter 73 of title 38, United States Code;

(4) teachers, school officers, and employees of the Board of Education of the District of Columbia, whose compensation is fixed under the District of Columbia Teachers' Salary Act of 1947, as supplemented by Public Law 151, Eighty-first Congress, approved June 30, 1949; and the chief judge and the associate judges of the Municipal Court of Appeals for the District of Columbia, and of the Municipal Court for the District of Columbia;

(5) officers and members of the Metropolitan Police, the Fire Department of the District of Columbia, the United States Park Police, and the White House Police;

(6) lighthouse keepers and civilian employees on lightships and vessels of the Coast Guard, whose compensation is fixed under authority of section 432 (f) and (g) of title 14 of the United States Code;

(7) employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual-labor occupations, and other employees including foremen and supervisors in positions having trade, craft, or laboring experience and knowledge as the paramount requirement, and employees in the Bureau of Engraving and Printing the duties of whom are to perform or to direct manual or machine operations requiring special skill or experience, or to perform or direct the counting, examining, sorting, or other verification of the product of manual or machine operations: *Provided*, That the compensation of such employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates: *Provided further*, That whenever the Civil Service Commission concurs in the opinion of the employing agency that in any given area the number of such employees is so few as to make prevailing rate determinations impracticable, such employee or employees shall be subject to the provisions of this Act which are applicable to positions of equivalent difficulty or responsibility.

(8) officers and members of crews of vessels, whose compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry;

(9) employees of the Government Printing Office whose compensation is fixed under Public, Numbered 276, Sixty-eighth Congress, approved June 7, 1924;

(10) civilian professors, lecturers, and instructors at the Naval War College and the Naval Academy whose compensation is fixed under Public Law 604, Seventy-ninth Congress, approved August 2, 1946, senior professors, professors, associate and assistant professors, and instructors at the Naval Postgraduate School whose compensation is fixed under Public Law 303, Eightieth Congress, approved July 31, 1947; and the Academic Dean of the Postgraduate School of the Naval Academy whose compensation is fixed under Public Law 402, Seventy-ninth Congress, approved June 10, 1946;

(11) aliens or persons not citizens of the United States who occupy positions outside the several States and the District of Columbia;

(12) the Tennessee Valley Authority;

(13) the Inland Waterways Corporation;

(14) the Alaska Railroad;

(15) the Virgin Islands Corporation;

(16) the Central Intelligence Agency;

(17) the Atomic Energy Commission;

(18) Production Credit Corporations;

(19) Federal Intermediate Credit Banks;

(20) the Panama Canal Company;

(21) (A) employees of any department who are stationed in the Canal Zone and (B) upon approval by the Civil Service Commission of the request of any department which has employees stationed in both the Republic of Panama and the Canal Zone, employees of such department who are stationed in the Republic of Panama;

(22) employees who serve without compensation or at nominal rates of compensation;

(23) employees none or only part of whose compensation is paid from appropriated funds of the United States: *Provided*, That with respect to the Veterans' Canteen Service in the Veterans' Administration, the provisions of this paragraph shall be applicable only to those positions which are exempt from the Classification Act of 1949, pursuant to section 4202 of title 38, United States Code;

(24) employees whose compensation is fixed under a cooperative agreement between the United States and (A) a State, Territory, or possession of the United States, or political subdivision thereof, or (B) a person or organization outside the service of the Federal Government;

(25) student nurses, medical or dental interns, residents-in-training, student dietitians, student physical therapists, student occupational therapists, and other student employees, assigned or attached to a hospital, clinic, or laboratory primarily for training purposes, whose compensation is fixed under Public Law 330, Eightieth Congress, approved August 4, 1947, or section 4114(b) of title 38, United States Code;

(26) inmates, patients, or beneficiaries receiving care or treatment or living in Government agencies or institutions;

(27) experts or consultants, when employed temporarily or intermittently in accordance with section 15 of Public Law 600, Seventy-ninth Congress, approved August 2, 1946;

(28) emergency or seasonal employees whose employment is of uncertain or purely temporary duration, or who are employed for brief periods at intervals;

(29) persons employed on a fee, contract, or piece work basis;

(30) persons who may lawfully perform their duties concurrently with their private profession, business, or other employment, and whose duties require only a portion of their time, where it is impracticable to ascertain or anticipate the proportion of time devoted to the service of the Federal Government;

(31) positions for which rates of basic compensation are individually fixed, or expressly authorized to be fixed, by any other law, at or in excess of the maximum scheduled rate of the highest grade established by this Act[.]*;*

(32) the National Security Agency.

SECTION 1581(a) OF TITLE 10, UNITED STATES CODE

§ 1581. Appointment: professional and scientific services

(a) The Secretary of Defense may establish not more than 120[1] civilian positions in the Department of Defense [, and not more than 25[1] civilian positions in the National Security Agency,] to carry out research and development relating to the national defense, military medicine, and other activities of the Department of Defense [and the National Security Agency, respectively,] that require the services of specially qualified scientists or professional personnel.

[1] Sec. 12(a) of Public Law 85-462 operated to increase from 120 to 292 the number of positions which the Secretary of Defense may establish in the Department of Defense and from 25 to 50 the number of positions which the Secretary may establish in the National Security Agency and which require the services of specially qualified scientists or professional personnel.

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SEC. 2. Each agreement entered into before the date of enactment of this Act by the Secretary of Commerce and a State highway department under authority of section 110(a) of the Federal-Aid Highway Act of 1956, or section 108(a) of title 23 of the United States Code shall be deemed to provide for actual construction of a road on such rights-of-way within a period of seven years following the fiscal year in which such request was made.

70 Stat. 382. 23 USC 110.

Approved May 29, 1959.

Public Law 86-36

AN ACT

To provide certain administrative authorities for the National Security Agency, and for other purposes.

May 29, 1959 [H. R. 4599]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 202 of the Classification Act of 1949, as amended (5 U.S.C. 1082), is amended by changing the period at the end thereof to a semicolon and adding the following new paragraph:

National Security Agency. Classification Act, exemption. 63 Stat. 954.

"(32) the National Security Agency."

SEC. 2. The Secretary of Defense (or his designee for the purpose) is authorized to establish such positions, and to appoint thereto such officers and employees, in the National Security Agency, as may be necessary to carry out the functions of such agency. The rates of basic compensation for such positions shall be fixed by the Secretary of Defense (or his designee for the purpose) in relation to the rates of basic compensaton contained in the General Schedule of the Classification Act of 1949, as amended, for positions subject to such Act which have corresponding levels of duties and responsibilities. Except as provided in section 4 of this Act, no officer or employee of the National Security Agency shall be paid basic compensation at a rate in excess of the highest rate of basic compensation contained in such General Schedule. Not more than fifty such officers and employees shall be paid basic compensation at rates equal to rates of basic compensation contained in grades 16, 17, and 18 of such General Schedule.

Positions and rates.

5 USC 1071 note.

Supergrades.

SEC. 3. Section 1581(a) of title 10, United States Code, as modified by section 12(a) of the Federal Employees Salary Increase Act of 1958 (72 Stat. 213), is amended by striking out ", and not more than fifty civilian positions in the National Security Agency," and the words "and the National Security Agency, respectively,".

70A Stat. 118. Professional and scientific positions.

SEC. 4. The Secretary of Defense (or his designee for the purpose) is authorized to establish in the National Security Agency not more than fifty civilian positions involving research and development functions, which require the services of specially qualified scientific or professional personnel, and fix the rates of basic compensation for such positions at rates not in excess of the maximum rate of compensation authorized by section 1581(b) of title 10, United States Code, as amended by paragraph (34)(B) of the first section of the Act of September 2, 1958 (72 Stat. 1456; Public Law 85-861).

Research and development positions.

70A Stat. 118.

SEC. 5. Officers and employees of the National Security Agency who are citizens or nationals of the United States may be granted additional compensation, in accordance with regulations which shall be prescribed by the Secretary of Defense, not in excess of additional compensation authorized by section 207 of the Independent Offices Appropriation Act, 1949, as amended (5 U.S.C. 118h), for employees whose rates of basic compensation are fixed by statute.

Employment outside U.S.

62 Stat. 194.

Reporting requirements.

49 Stat. 956.

SEC. 6. (a) Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654)) shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

(b) The reporting requirements of section 1582 of title 10, United States Code, shall apply to positions established in the National Security Agency in the manner provided by section 4 of this Act.

Supergrades. 72 Stat. 213A.

SEC. 7. The total number of positions authorized by section 505(b) of the Classification Act of 1949, as amended (5 U.S.C. 1105(b)), to be placed in grades 16, 17, and 18 of the General Schedule of such Act at any time shall be deemed to have been reduced by the number of positions in such grades allocated to the National Security Agency immediately prior to the effective date of this section.

Effective date.

SEC. 8. The foregoing provisions of this Act shall take effect on the first day of the first pay period which begins later than the thirtieth day following the date of enactment of this Act.

Approved May 29, 1959.

Public Law 86-37

May 29, 1959 [H. R. 147]

AN ACT

To suspend temporarily the tax on the processing of palm oil, palm-kernel oil, and fatty acids, salts, and combinations, or mixtures thereof.

Palm oil, etc. Tax suspension. 68A Stat. 536. 26 USC 4511.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the tax imposed under section 4511(a) of the Internal Revenue Code of 1954 shall not apply with respect to the first domestic processing of palm oil, palm-kernel oil, fatty acids derived therefrom, or salts thereof, or of any combination or mixture solely because such combination or mixture contains a substantial quantity of one or more of such oils, fatty acids, or salts, during the period beginning with the first day of the first month which begins more than 10 days after the date of the enactment of this Act and ending with the close of June 30, 1960.

Effective period.

Approved May 29, 1959.

Public Law 86-38

June 10, 1959 [S. 1217]

AN ACT

To add certain public domain lands in Nevada to the Summit Lake Indian Reservation.

Summit Lake Indian Reservation, Nev. Lands, addition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the southeast quarter northeast quarter, northeast quarter southeast quarter section 20, township 42 north, range 26 east, Mount Diablo meridian, Nevada, situated within the exterior boundaries of the Summit Lake Indian Reservation, Humboldt County, Nevada, containing 80 acres, are hereby withdrawn from the public domain, subject to any valid existing rights heretofore initiated under the public land laws, and added to and made a part of the Summit Lake Indian Reservation.

Approved June 10, 1959.